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July 28, 2000

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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

Carol Matthey  
Common Carrier Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

*RE: CC Docket No. 98-141, Response to SBC's Requests for Interpretation, Waiver or Suspension of Merger Conditions Affecting the Ownership of Plugs/Cards and OCDs*

Dear Ms. Matthey,

Rhythms NetConnections Inc. ("Rhythms") reiterates its position that, the Commission should not grant SBC's request for waiver of the Merger Conditions with regard to the DLC cards.<sup>1</sup> While the OCD/ATM Switch, like an MDF or other aggregation point, would be appropriately owned by the SBC ILEC, the CLECs, including SBC's advanced services affiliates, are the appropriate owners of the DLC/DSL cards, which are quite obviously DSL equipment. SBC's latest filings with the FCC only further underscore Rhythms' position.<sup>2</sup>

The entire point of creating a separate advanced services affiliate is to force the SBC ILEC to treat its DSL entity in the same manner in which it treats competitors. SBC's latest filing makes abundantly clear that the separate subsidiary structures that were put in place were not adequate to create this dynamic. Now—the very first time that these rules are being put to the test—SBC requests that even those too-weak rules be bent and broken.

SBC's waiver request is a clear attempt to rewrite those merger conditions that they find unworkable or dissatisfactory. As these conditions were voluntary, this raises the question of whether SBC was forthright in its discussions with the Commission, CLECs and the public on

<sup>1</sup> Comments of DATA on SBC's Request for Interpretation, Waiver or Modification of the SBC/Ameritech Merger Conditions, CC Docket No. 98-141, ASD File No. 99-49 (March 3, 2000) at 10; Reply Comments of DATA on SBC's Request for Interpretation, Waiver or Modification of the SBC/Ameritech Merger Conditions, CC Docket No. 98-141, ASD File No. 99-49 (March 10, 2000) at 7; Letter from the DSL Access Telecommunications Alliance to Carol Matthey, Deputy Bureau Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 98-141 (April 11, 2000) at 2.

<sup>2</sup> Letter from SBC Communications, Inc., to Lawrence E. Strickling, Chief of Common Carrier Bureau, Federal Communications Commission (July 13, 2000) ("SBC Voluntary Commitments").

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these conditions. Now that the merger is complete, there is little ability for meaningful recourse as SBC, bit by bit, backs away from its commitments.

Tellingly, SBC has made absolutely no showing of necessity for waiving rules for line cards. Indeed, SBC concedes that it can (and will) proceed with Project Pronto without an FCC waiver. Thus, there is clearly no technical difficulty with affiliate ownership of the cards. And, any argument of administrative difficulty would make a mockery of SBC's offer to work with CLECs to develop their own line cards.<sup>3</sup>

Accordingly, the Commission must recognize the strategic points that SBC's proposal is designed to make. First, SBC's proposal is blatant attempt to transform facilities-based competition in broadband into nothing more than resale. This position is directly contrary to the statutory scheme of ensuring development of facilities based competition,

Displaying an undiscovered talent for self-referential irony, SBC makes this point directly by saying that its voluntary commitments "will provide the pro-competitive benefit of eliminating the need for carriers to deploy their own equipment at SBC's remote terminals."<sup>4</sup> Facilities-based DSL competition is the most vibrant sector that has resulted from the 1996 Telecommunications Act.

Second, SBC is positioning itself to argue CLECs are being treated "just like" the SBC subsidiary, because both buy wholesale "services" from ILEC. Yet, SBC cannot simply obliterate a statutorily-mandated form of competitive entry by having its subsidiary declare that resale is sufficient.

If the SBC CLEC owned DLC/DSL line cards, it would be even more apparent that non-affiliated CLECs have the right to own such cards. That is, even with reference only to the Act's nondiscrimination standards, it would be apparent that CLECs are entitled to own line cards.<sup>5</sup>

But SBC's approach ignores a key issue even if the focus is only on the Act's nondiscrimination standards. SBC DSL services group got SBC to design and deploy the cards that the DSL services group wanted. CLECs should likewise have the ability to design the network that meets their business plans, and preserving their entitlements under the Act and the Commission rules ensures that. Certainly, such rights cannot and should not be "compromised" away as part of a merger condition modification request.

The DSL industry obviously represents the most dynamic and widespread facilities-based competition that has emerged since the 1996 Act. The industry includes three nationwide facilities-based competitors that among them have raised over \$6 billion to build their own networks. These three DSL providers have deployed DSL equipment in over 4000 central

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<sup>3</sup> *Voluntary Commitments* at 7-8.

<sup>4</sup> *Voluntary Commitments* at 2.

<sup>5</sup> More fundamentally, SBC's approach blithely ignores CLECs' right under the Act and this Commission's rules to obtain collocation, unbundled network elements and interconnection such that competitive CLECs can own and deploy their own cards. These standards provide CLECs the right to own and deploy line cards even if SBC's DSL subsidiary chooses not to do so.

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offices. Twice as many or more regional facilities-based DSL companies have also invested significantly in network facilities.


The result is that barely three years after the Act went into effect, at least half the nation may choose among at least four , and often as many as six or seven, facilities-based providers of broadband services. This is obviously an unpleasant reality for SBC because no monopoly—especially one that now control roughly one-third of the country—likes to lose market share. SBC is firing the first salvo in effort to end that competition. SBC must not be allowed to disconnect Americans from that full range of competitive choices.

The Commission must just say no to SBC and enforce its rules to require the SBC subsidiary to own the DLC/DSL line cards consistent with the merger conditions.

As the Commission has repeatedly said, and as Rhythms has agreed, we recognize the difficulty of dealing with many of the fundamental issues raised by Project Pronto in the context of a request for waiver of the merger conditions. This context does not lend itself well, for example, to any consideration of the fundamental issue of whether SBC's proposal complies with the Telecommunications Act.

Therefore, as it has pledged to do, the Commission should deny the waiver request as to the line cards and open a proceeding to explore these fundamental issues, separate and apart from this waiver request

Respectfully submitted,

By: 

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I, Christopher J. Lamb, do hereby certify that on this 28th day of July, 2000, that I have served a copy of the foregoing document via \* messenger and U.S. Mail, postage pre-paid, to the following:



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